STAT

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 3, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer-

Central Intelligence Agency
Department of Defense
National Security Council
Department of the Treasury
Department of State

SUBJECT: Justice proposed report on H.R. 3872, a bill amending the National Security Act of 1947.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than

FRIDAY, JANUARY 27, 1984.

Questions should be referred to Tracey Lawler (395-4710) the legislative analyst in this office.

Ronald K Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Executive Registry
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Enclosures
cc: Arnie Donahue

Completed verbally w/ Tracy Lawler 1/23/84 - filed in

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U.S. Department of J ice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

Honorable Edward P. Boland
Chairman
Permanent Select Committee
on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is to proffer the views of the Department of Justice on H.R. 3872, a bill to amend the National Security Act of 1947. The Department of Justice recommends against enactment of this legislation.

H.R. 3872 is a slightly altered version of H.R. 2787, which was opposed by the Department of Justice in a letter to you of September 20, 1983. (Attached). H.R. 3872 differs from H.R. 2787 in that a legislative veto provision, recently declared unconstitutional in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983), has been removed and special requirements for additional findings by the President have been added when clandestine paramilitary or military activities are planned.

The Department of Justice opposes H.R. 3872 for the same reasons that it opposed H.R. 2787. Namely, the provisions of H.R. 3872 represent a significant departure from existing presidential authorities and congressional oversight mechanisms. Congress in the past has carefully circumscribed its oversight function so as not to intrude upon the President's constitutional authority and ability to conduct covert intelligence activities. 50 U.S.C. § 413(a)(1)(A).1/

As was discussed in our earlier letter, special or covert activities are currently subject to presidential findings and are briefed orally to the congressional oversight committees. 50 U.S.C. § 413(a)(1). This briefing ordinarily occurs prior to the initiation of an activity, but the law provides for delayed

1/ See comment of Senator Baker in S. Rep. No. 730, 96th Cong. 2d Sess. 9-10 (1980) (Pub. L. No. 96-450, Intelligence Authorization Act), reprinted in [1980] U.S. Code Cong. & Ad. News 4192, 4200.

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reporting in certain circumstances where the President determines prior reporting to be inadvisable. 50 U.S.C. § 413(b). Congressional oversight is exercised primarily through the budget process2/, or appeals to the President.

H.R. 3872, like H.R. 2787, would alter the balance in the "zone of twilight" that exists between congressional and presidential authority over national security and foreign policy matters.3/ We do not believe that any such alteration is necessary or advisable. In establishing the current oversight mechanism in Section 501 of the National Security Act of 1947, which requires the Executive Branch to inform Congress of significant intelligence activities, Congress specifically recognized the need for an appropriate balance to be struck in its review of such activities:

> Section 501 is intended to authorize the process by which information concerning intelligence activities of the United States is to be shared by the two branches in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive Branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of Section 501 is to carry this working relationship forward into statute.

S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980). We note that Congress itself has stated on several occasions that existing oversight mechanisms, agreed upon after extensive discussions between the Executive and Legislative Branches, have served to keep Congress well informed. See [1980] U.S. Code Cong. & Ad. News 4197-98.

2/ See Report of the Senate Committee on Intelligence, S. Rep. No. 10, 98th Cong., 1st Sess. 2 (1983).

3/ See, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

Since the existing mechanisms have worked well and have given the President the flexibility and discretion needed to conduct the nation's intelligence operations, we oppose enactment of H.R. 3872. At a minimum, because of the profound nature of the policy questions involved in intelligence oversight, we believe any alteration of existing mechanisms should evolve from extensive discussions between the Executive Branch and Congress.

For the foregoing reasons, the Department of Justice recommends against enactment of H.R. 3872.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

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Office of the Assistant Attorney General

Washington, D.C. 20530

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Honorable Edward P. Boland
Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is to proffer the views of the Department of Justice on H.R. 2787, a bill to amend the National Security Act of 1947, and H.R. 3114, a bill to improve congressional oversight of CIA expenditures. The Department opposes enactment of both H.R. 2787 and H.R. 3114, because we believe they would intrude unduly upon existing presidential flexibililty and authority over national security matters. We believe the existing formal and informal cooperation between the Executive Branch and Congress with respect to intelligence operations has proven largely successful in the past, while retaining necessary flexibility for the President to conduct such operations. We would hope that any alteration in that pattern of cooperation on the scale contemplated by H.R. 2787 and H.R. 3114 would evolve only from extensive discussions between the Executive Branch and Congress.

Discussion

H.R. 2787 would expand upon the presidential finding required as a precondition to certain CIA activities in the "Hughes-Ryan Amendment," 22 U.S.C. § 2422, as amended, by repealing that Amendment and incorporating extensive reporting and approval requirements for all special activities into the National Security Act of 1947, 50 U.S.C. § 401 et seq. The Hughes-Ryan Amendment requires a presidential finding that an operation is "important to the national security of the United States" before the CIA may expend funds on an operation abroad

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unless the operation involves solely intelligence gathering. H.R. 2787 would expand this provision and require the President, before an activity could be initiated, to make detailed written findings, together with a description and justification of the activity, and provide these to the House and Senate Intelligence committees, which could disapprove the proposed activity. H.R. 2787 further would provide for presidential authorization of categories of special activities. Special activities falling within these categories would require presidential findings, would be subject to congressional oversight, and would be supervised by the National Security Council.

The provisions of H.R. 2787 represent a significant departure from existing presidential authorities and congressional oversight mechanisms. Congress in the past has carefully circumscribed its oversight function so as not to intrude upon the President's constitutional authority and ability to conduct covert intelligence activities. 50 U.S.C. § 413(a)(1)(A). 1/ Special or covert activities are currently subject to presidential findings and are briefed orally to the congressional oversight committees. 50 U.S.C. § 413(a)(1). This briefing ordinarily occurs prior to the initiation of an activity, but the law provides for delayed reporting in certain circumstances where the President determines prior-reporting to be inadvisable. 50 U.S.C. § 413(b). Congressional oversight is exercised primarily through the budget process 2/, or appeals to the President.

H.R. 3114 represents a similar expansion of congressional oversight in the form of restrictions on expenditures by the Central Intelligence Agency. The CIA is currently authorized to allocate funds for the broad array of purposes listed in 50 U.S.C. § 403j, and may expend funds for "objects of a confidential, extraordinary, or emergency nature" based solely upon the certificate of the Director of Central Intelligence. 50 U.S.C. § 403j(b). In recent years, the congressional oversight committees have more closely monitored the use of this "unvouchered funds" authority and have placed ceilings on the amount of money that may be accumulated in this account. Nonetheless, the Director of Central Intelligence has retained substantial flexibility in the use of this authority.

1/ See comment of Senator Baker in S. Rep. No. 730, 96th Cong. 2d Sess. 9-10 (1980) (Pub. L. No. 96-450, Intelligence Authorization Act), reprinted in [1980] U.S. Code Cong. & Ad. News 4200.

2/ See Report of the Senate Committee on Intelligence, S. Rep. No. 10, 98th Cong., 1st Sess. 2 (1983).

H.R. 3114 would alter this system to require specific congressional approval for any expenditures by the CIA on covert military or paramilitary activities and for any expenditures exceeding $2 million for a single activity. While the CIA is obviously in the best position to describe the burden that would be created by these requirements, we believe that H.R. 3114 would intrude into existing presidential authority over the conduct of covert intelligence activities.

The combined effect of H.R. 2787 and H.R. 3114 would be to alter the balance of power in Congress' favor in the "zone of twilight" that exists between congressional and presidential authority over national security and foreign policy matters. 3/ We do not believe that any such alteration is necessary or advisable. In establishing the current oversight mechanism contained in Section 501 of the National Security Act of 1947, which requires the Executive Branch to inform Congress of significant activities, Congress specifically recognized the need for an appropriate balance to be struck in its review of such activities:

> Section 501 is intended to authorize the process by which information concerning intelligence activities of the United States is to be shared by the two branches in order to enable them to fulfill their respective duties and obligations to govern intelligence activities within the constitutional framework. The Executive Branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of Section 501 is to carry this working relationship forward into statute.

S. Rpt. 96-730, 96th Cong., 2d Sess. at 4-5. We note that Congress itself has stated on several occasions that existing oversight mechanisms, agreed upon after extensive discussions between the Executive and Legislative Branches, have served to keep Congress well informed. See [1980] U.S. Code Cong. & Ad. News 4197-98.

Since the existing mechanisms have worked well and have given the President the flexibility and discretion he needs to conduct the nation's intelligence operations, we oppose enactment of H.R. 2787 and 3114. At a minimum, because of the pro-

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3/ See, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

found nature of the policy questions involved in intelligence oversight, we believe any alteration of existing mechanisms should evolve from extensive discussions between the Executive Branch and Congress.

Finally, we note that both H.R. 2787 and H.R. 3114 contain provisions that would allow disapproval, by action of the House and Senate Intelligence committees, of activities or expenditures proposed by the President. H.R. 2787 would authorize those committees to disapprove any special activity proposed by the President except for certain categories of activities designated by the President that do not involve elements of high risk, major resources, or serious political consequences. H.R. 3114 would require approval of both committees for: (1) release of funds appropriated to the Reserve for Contingencies of the CIA or use of transfer authority by the CIA in excess of $2,000,000 for any activity; and (2) release of funds appropriated to the Reserve for Contingencies of the CIA or use of transfer authority for the purpose, or which will have the effect, of supporting any covert military or paramilitary activity.

Both of these mechanisms fall within the class of "legislative vetoes" that are clearly unconstitutional under the Supreme Court's recent decision in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983) ("Chadha"). In that ruling, the Court made clear that when Congress purports to exercise its legislative power, it must act in conformity with the requirements of Art. I, §§ 1 and 7 of the Constitution: passage by a majority of both Houses and presentment to the President for approval or veto. "It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framer's decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Chadha, slip op. at 31. Any attempt by Congress to exercise its legislative power in a manner that falls short of the requirements of Art. I, because it does not require passage by a majority of both Houses or because it does not require presentment to the President, is therefore unconstitutional. H.R. 2787 and H.R. 3114 would empower two congressional committees to make policy determinations as to whether the President and the CIA should engage in particular covert activities -- a determination that rests within the President's discretion. Those congressional review mechanisms therefore clearly do not meet the constitutional requirements for legislative action articulated by the Court in Chadha; they must meet those requirements because their exercise would purport to affect the legal rights of persons outside the Legislative Branch. Chadha, slip op. at 32.

For the foregoing reasons, the Department of Justice opposes enactment of both H.R. 2787 and H.R. 3114.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General